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Nos. 04-1034, 04-1384

In The

# Supreme Court of the United States

RAPANOS, *et al.*, *Petitioners*,
v.
UNITED STATES, *Respondent*.

CARABELL, *et al.*, *Petitioners*,
v.
U. S. Army Corps of Engineers, *et al.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

## Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners

Edwin Meese III
214 Massachusetts Ave. N.E
Washington D.C. 20002

John C. Eastman
*Counsel of Record*
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

*Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence*

## QUESTIONS PRESENTED

1. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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## INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that We the People delegated to the national government only certain, specifically enumerated powers and that the bulk of sovereign power, including the police power at issue here, was reserved to the States or to the people. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence. the selective appearance as *amicus curiae* in cases of constitutional significance. Of particular relevance here, the Institute has a Center for Local Government, which promotes the theory and practice of self-government, emphasizing the themes of limited, constitutional government, federalism, property rights, and energetic citizenship. In addition, the Institute has published extensively about the constitutional limitations on the powers delegated to the national government, including John C. Eastman, "*A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*," 2004 CATO SUPREME COURT REVIEW 469 (2004), and a book edited by Gordon Jones and Institute Senior Fellow John Marini entitled THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS.

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Kelo* v. *City of New London, Connecticut*, 125 S.Ct. 2655 (2005); *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). It seeks to elaborate on the arguments that have been made by Petitioners regarding the scope of the power delegated to Congress under the Commerce Clause. The Claremont Institute believes that its scholarly

expertise about the theoretical and historical origins of the American constitutional system of government will aid this Court in evaluating whether the assertion of jurisdiction made by the Army Corps of Engineers over wetlands with only a tenuous hydrological connection to any navigable water of the United States exceeds Congress's authority to regulate commerce among the states.

## SUMMARY OF ARGUMENT

Over the past decade and a half, this Court has reinvigorated the Founders' vision of a constitutional system based on a division of the people's sovereign powers between the national and state governments. In *New York* v. *United States*, 505 U.S. 144, 156-57 (1992), for example, the Court recognized that the principle of reserved powers underlying the Tenth Amendment serves as a barrier to the exercise of power by Congress. In *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), the Court recognized that the principle was grounded not so much in the text of the Tenth Amendment but in the word "proper" of the Necessary and Proper clause, as informed by the overall structure of the Constitution and the numerous clauses that recognize the retention of sovereign powers by the States. This same idea of state sovereignty has been given voice in the parallel cases arising under the Eleventh Amendment: *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 527 U.S. 706 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

Yet for the Founders, the division of sovereign powers was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens. *United States* v. *Morrison*, 529 U.S. 598, 616

n.7 (2000); *United States* v. *Lopez*, 514 U.S. 549, 552, 582 (1995). And it was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people's control. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). The Tenth and Eleventh amendments are simply examples of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry.

In interpreting the federal Clean Water Act to cover wetlands which have, at best, only a tenuous connection to the navigable waters of the United States, for clearly police power rather than commerce power purposes, the United States Army Corps of Engineers has taken the statute well beyond the constitutional bounds of the Commerce Clause. U.S. CONST. ART. I, § 8, cl. 3. The Corps' effort to regulate isolated wetlands is not a regulation of commerce, and it is not a law that gives effect to some regulation of commerce (much less a "necessary" and "proper" one). To construe the Commerce Clause as broadly as the Corps does here is to render meaningless the primary check on federal power envisioned by the founders—the doctrine of limited, enumerated powers. Moreover, by essentially preempting land use decisions of all 50 states and their thousands of municipal subdivisions, the Corps has here intruded upon the powers reserved to the States in a way that makes the intrusions at issue in *New York* v. *United States* and *Seminole Tribe* look relatively minor.

## ARGUMENT

### I. By Interpreting the Clean Water Act to Cover Isolated Wetlands, the Corps Has Ignored the Principle of Enumerated Powers, a Principle Which the Founders Believed to Be Essential to Liberty.

When the framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; it could not counteract the crippling trade barriers that were being enacted by the several states against each other; and it could not even insure that its citizens, especially those living on the western frontier, were secure in their lives and property. *See, e.g.*, Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were "as great in many instances as those imposed on foreign Articles"); THE FEDERALIST NO. 22, at 144-45 (Hamilton) (C. Rossiter, ed., 1961) (referring to "[t]he interfering and unneighborly regulations in some States," which were "serious sources of animosity and discord" between the States); *New York*, 505 U.S., at 158 ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience") (quoting THE FEDERALIST NO. 42, p. 267 (Madison) (C. Rossiter ed. 1961)).

But the framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. *See, e.g.*, *Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 137 (1959) ("the men who

wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power"); *Garcia* v. *San Antonia Metropolitan Transportation Authority*, 469 U.S. 528, 568-69 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor). Our forebears had not successfully prosecuted the war against the King's tyranny merely to erect in its place another form of tyranny.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people's liberty. *See* THE FEDERALIST NO. 51, at 322 (Madison). The framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu, out of recognition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (Madison).

But the framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was sovereign and indivisible. Instead, the Founders contended that the people themselves were the ultimate sovereign, *see, e.g.*, James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 J. WILSON, THE WORKS OF JAMES WILSON 770 (R. McCloskey ed., 1967), and could delegate all or part of their sovereign powers, to a single government or to multiple governments, as, in their view, was "most likely to effect their Safety and Happiness," Declaration of Independence, ¶ 2. The importance of the division of sovereign powers was

highlighted by James Wilson in the Pennsylvania ratifying convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made *for* the people as well as *by* them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people.

James Wilson, Pennsylvania Ratifying Convention, (Dec. 4, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62.

As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves. *See, e.g.*, THE FEDERALIST NO. 39, at 256 (Madison) (noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers delegated by the proposed

Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended"); *Gregory*, 501 U.S. at 457 ("The Constitution created a Federal Government of limited powers").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment. *See* U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in the main body of the Constitution itself. *See* U.S. CONST. ART. I, Sec. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis added)); U.S. CONST. ART. I, Sec. 8 (enumerating powers so granted); *see also M'Culloch*, 17 U.S. (4 Wheat.), at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted"); *Lopez*, 514 U.S., at 552 ("We start with first principles. The Constitution creates a Federal Government of enumerated powers").

The constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, but rather "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S., at 552 (quoting *Gregory*, 501 U.S., at 458); *see also Morrison*, 120 S. Ct., at 1753 n.7 ("As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power"

(citing *Arizona* v. *Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting); *Gregory*, 501 U.S., at 458-59; *Atascadero State Hospital* v. *Scanlin*, 473 U.S. 234, 242 (1985) (quoting *Garcia*, 469 U.S., at 572 (Powell, J., dissenting))); *Garcia*, 469 U.S., at 582 (O'Connor, J., dissenting) ("This division of authority, according to Madison, would produce efficient government and protect the rights of the people") (citing THE FEDERALIST NO. 51, pp. 350-351 (Madison) (J. Cooke ed. 1961)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S., at 582 (quoting *Gregory*, 501 U.S., at 458); *Gregory*, 501 U.S., at 459 (quoting THE FEDERALIST NO. 28, pp. 180-81 (Hamilton) (J. Cooke ed. 1961)); *id.* (quoting THE FEDERALIST NO. 51, p. 323 (Madison) (J. Cooke ed. 1961)); *see also Garcia*, 469 U.S., at 581 (O'Connor, J., dissenting) ("[The Framers] envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States" (citing *FERC* v. *Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting)); *id.*, at 571 (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government").

When Congress (or a federal agency, in supposed reliance on an act of Congress) acts beyond the scope of its enumerated powers, therefore, it does more than simply intrude upon the sovereign powers of the states; it acts without constitutional authority, that is, tyrannically, and places our liberties at risk. *See, e.g.*, THE FEDERALIST NO. 33, at 204 (Hamilton) (noting that laws enacted by the Federal Government "which are *not pursuant* to its constitutional powers,

but which are invasions of the residuary authorities of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such").

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and morals of the people—the so-called police power. *See, e.g.*, THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). The powers at issue in this case—the granting of land use permits and the regulation of wholly intrastate "wetlands"—are within the core of the police powers reserved to the states or to the people.

Congress does retain some measure of discretion to choose the means necessary for giving effect to its enumerated powers, of course, *see infra*, at 20-21, but it cannot use its discretionary power over means in furtherance of ends not granted to it. As Chief Justice Marshall noted in *M'Culloch* v. *Maryland*: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the [national] government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." 17 U.S. (4 Wheat.), at 423; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 317 (1936)

(Hughes, C.J., separate opinion) ("Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly"). Because, as described below, Congress's attempts, as interpreted by the Corps of Engineers, to link the vintage exercise of the state police powers at issue here to its power to regulate interstate commerce is pretext of the highest order, Chief Justice Marshall's admonition is directly on point: It is the duty of this Court to say that the interpretation of the Clean Water Act propounded by the Corps of Engineers is not the law of the land.

## II. The Expansive Application of the Clean Water Act to Isolated Wetlands Is Neither a Regulation of Commerce Nor a Necessary and Proper Means of Giving Effect to a Regulation of Commerce.

As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade. *See, e.g., Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *Lopez*, 514 U.S., at 585 (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons*, 22 U.S. (9 Wheat.), at 190; *see also Corfield*, 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include

all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 529 U.S., at 616 n.7). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate wholly intrastate waterways, therefore, would have been completely foreign to them. And *a fortiori*, any claim that the Commerce Clause encompassed a power to make land use regulations governing what a man could do on his own property, merely because his property abutted a ditch that connected to a creek, which in turn connected to a river that at some point became navigable—shared "a hydrological connection" that put them into a "symbiotic relationship" is the way the Sixth Circuit described it below, *United States* v. *Rapanos*, 376 F.3d 629, 640 (CA6 2004)—would have been beyond the pale. Add to that tenuous connection the true purpose of the Clean Water Act, which is to protect aquatic ecosystems rather than interstate commerce, and the claim of power asserted here by the Corps would have been quite incomprehensible to those who drafted and ratified the *Commerce* Clause.

This originally narrow understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *E.C. Knight*, 156 U.S., at 12, because "Commerce succeeds to manufacture, and is not a part of it." "The

fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.*, at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture (as well as local land use), was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See, e.g., E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.), at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891)); *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation

> between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government. . . .

156 U.S., at 13; *see also Carter Coal*, 298 U.S., at 301 (quoting *E.C. Knight*); *Garcia*, 469 U.S., at 572 (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S., at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*); *id.*, at 586 (Thomas, J., concurring) ("the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture"). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress;

> and, consequently, they remain subject to State legislation.

*Gibbons*, 22 U.S., at 203; see also *id.*, at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted recently in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government." 514 U.S., at 555 (quoting *Schechter Poultry*, 295 U.S., at 548).

As should be obvious, the interpretation of the Clean Water Act at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution, and neither court below even addresses, much less persuasively demonstrates, any commerce clause authority for the regulation at issue here. Rapanos and Carabell each sought to make improvements on their own land, not engage in interstate commerce. Land, of course, is the quintessential thing that does not move in interstate commerce. *See Camps Newfound/Owatonna* v. *Town of Harrison, Maine*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

To be sure, each of the petitioners had standing water on their land, and that standing water may have soaked into the land enough to qualify the land as "wetland." It is even possible that some of the moisture on their land might eventually find its way, through ditch and dell, to navigable waters of the State of Michigan, and those navigable waters might themselves ultimately be connected to navigable waters of the United States. But to contend, as the government did below in the two cases at issue here and in the previous crimi-

nal matter involving the *Rapanos* petitioners, that the Clean Water Act's definition of "navigable waters," expansively interpreted by regulation to include "wetlands adjacent to traditional navigable waters," 33 C.F.R. § 328.3(a)(7), can constitutionally be expanded even further to permit federal regulation of this land—nearly twenty miles from the nearest navigable stream in the Rapanos' case, *United States* v. *Rapanos*, 339 F.3d 447 (CA6 2003)—is to render meaningless any notion of limits on federal power.

Nor does the Necessary and Proper Clause provide a valid ground for the Corps of Engineers expansive assertion of power here. As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.), at 187 (describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch*, 17 U.S. (4 Wheat.), at 324 (describing the Necessary and Proper Clause as merely a means clause). There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here. Congress simply cannot use such a pretextual reed to support its exercise of what is essentially a police power. *M'Culloch*, 17 U.S. (4 Wheat.), at 423.[2] Thus, while it is undoubtedly true that, in today's world, the quantum of "commerce among the states" is much larger than in the founding era, the expansion in quantity does not give Congress a different qualitative power.

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[2] Indeed, the whole Clean Water Act, and not just the expanded interpretation propounded by the Corps of Engineers that is at issue here, is arguably unconstitutional pretext. Ensuring the navigability of the nation's waters would be a Commerce Clause purpose, but that is not what the Clean Water Act purports to do. *See infra*, at 20-21.

Under the original view of the Commerce Clause, therefore, this is an extremely easy case. Indeed, it is hard to imagine regulations more removed from the Commerce Clause power, as originally understood, than the interpretations of the Clean Water Act put forward by the Corps of Engineers here and its analogous "migratory bird" rule already invalidated by this Court in *SWANCC*.

## III. Even under the expanded view of the Commerce Clause taken in this Court's modern-era precedents, the Corps' expansive claims of jurisdiction exceed the outer limits of the power afforded to Congress.

Even when this Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress. Thus, in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *Morrison*, 529 U.S., at 608). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S. 495, 554 (1935) (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S., at 567; *Morrison*, 529 U.S., at 616 n.6).

These reservations were key to this Court's decisions in *Lopez*, *Morrison*, and played a prominent role in *SWANCC* as well. *See Lopez*, 514 U.S., at 566; *Morrison*, 529 U.S., at

608; *SWANCC*, 531 U.S., at 173-74. As in those cases, the interpretation of the Clean Water Act at issue here does not regulate the channels or the instrumentalities of interstate commerce. Try as they might, the *Rapanos* and *Carabell* petitioners cannot transport any goods from their land to market via a waterway that begins in the moist soil of their own land (even assuming that the moisture itself can make its way to a navigable stream—a factually disputed point).

Nor does there appear to be any substantial effect on interstate commerce, and the courts below do not bother to identify one, or even to address this component of the *Lopez* analysis. Instead, the Court of Appeals based its decisions on the Corps' contorted statutory claim that the addition of fill dirt to Petitioners' own properties fell under the Corps' jurisdiction because the moist soil on the property might cross a berm and move into a ditch, which "connects to the Sutherland-Oemig Drain, which empties into the Auvase Creek, which empties into Lake St. Clair, which is part of the Great Lakes drainage system." *Carabell* v. *U.S. Army Corps of Engineers*, 391 F.3d 704, 705 (CA6 2004). Merely to state the supposed connection is to refute it, yet this broad interpretation of the Clean Water Act is entitled to *Chevron* deference, we are told in *Rapanos*, because the Corps' interpretation is "neither 'arbitrary, unreasonable, or manifestly contrary to the statute.'" *Rapanos*, 376 F.3d, at 641 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

Although the *Rapanos* court mentioned this Court's holding in *SWANCC* that *Chevron* deference does not apply "where an otherwise acceptable construction of a statute would raise serious constitutional problems," it nevertheless refused to follow that holding, noting instead that this Court had applied *Chevron* deference in the pre-*SWANCC* (and pre-*Lopez*) case of *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). *Riverside Bayview* dealt

with lands directly adjacent to a navigable lake, of course, so the potential connection with interstate commerce was at least arguable. 474 U.S., at 124. Even assuming *Chevron* deference remains appropriate in those circumstances, the *SWANCC* rule must be applied when, as here, the constitutionality of the interpretation is much more tenuous. Adjacent to a ditch, that leads to a creek, that leads to a river, that ultimately has a hydrological connection with navigable water, is a far cry from directly adjacent to a navigable lake, particularly in light of the supposed Commerce Clause authority for the regulation.

But again, the lower courts do not even address, much less demonstrate, that the Corps' interpretation fits within even the far outer limits of Commerce Clause authority. The addition of fill dirt to Petitioners' respective properties *might* alter the ecology of the area, which in turn would—what?—neither the lower courts nor the government even bothered to articulate a Commerce Clause purpose furthered by the Corps of Engineers' expansive jurisdictional claims.

At least in *SWANCC*, the government made an effort to tie its regulatory claims to an interstate financial impact by arguing that a decline in the migratory bird populations might result in fewer people traveling across state lines to hunt, trap and observe the migratory birds, which would in turn cause a decline in expenditures made by such traveling bird hunters and bird watchers, which would amount to a substantial effect on interstate commerce. *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). This Court quite sensibly questioned those claims in *SWANCC* as raising "significant constitutional questions." 531 U.S., at 173. We could go farther, and recognize them for what they truly were—a merely pretextual use of a commerce clause hook to attempt to validate an unconstitutional assertion of a police power. *See Lopez*, 514 U.S., at 567. Yet the government's

contentions in support of federal power here are even weaker than they were in *SWANCC*, and the government offers precious little to rationalize its power grab on Commerce Clause grounds, even pretextually. Rather, having lost the pretextual argument in *SWANCC*, the government seems bent on making a frontal assault on the very notion of limited, enumerated powers, boldly asserting a police power ground to support its claim of power. If it is successful, it would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"—the very concern that motivated this Court to strike down the Violence Against Women Act in *Morrison*, 529 U.S., at 615.

In short, even under the expanded view of the Commerce Clause that has been in place since the New Deal, the interpretation of the Clean Water Act proffered by the Corps of Engineers remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.

The statute enacted by Congress does not actually pretend otherwise. Its express purpose is not to insure the navigability of the nation's waterways—a proper commerce clause purpose—but is rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—a clear police power purpose. *See* 33 U.S.C. § 1251(a).

If the statute merely prohibited the discharge into navigable waters of dredged or filled material, or other pollutants that could reasonably threaten navigability, the law would arguably be both a necessary and a proper means to further Congress's powers under the Commerce Clause, because such discharges could at some point threaten navigation.[3]

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[3] This is true even under the statutory definition of "navigable waters" as "the waters of the United States, including the territorial seas." 33

But the statute prohibits the discharge of "any pollutant," not just dredged or filled material or other pollutants that would threaten navigability. 33 U.S.C. § 1311. There is therefore not the jurisdictional element that this Court described as important in *Lopez*. 514 U.S., at 560. Moreover, under the Corps' interpretation, the statute prohibits the discharge of fill even in intrastate "mudflats, sandflats, wetlands, sloughs, prairie potholes," etc.—waters having no connection what-

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U.S.C. § 1362(7). "The waters of the United States" is both broader and more narrow than "navigable waters," from a commerce clause perspective. The phrase is narrower because the clause "of the United States" has historically excluded waters that are wholly within a single state, whether navigable or not. *See, e.g., Miller* v. *City of New York*, 109 U.S. 385, 395-96 (1883) ("by 'navigable waters of the United States' are meant such as are navigable in fact, and which, by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the states" (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870)); *South Carolina* v. *Georgia*, 93 U.S. 4, 10 (1876) (describing the navigable waters of the United States as those "which are accessible from a State other than those in which they lie"); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596 (1941) (same). The phrase is broader because "waters" would seem to include non-navigable waters, which could be reached by Congress under the Necessary and Proper Clause (rather than the Commerce Clause directly), *only if* regulation of such waters was both necessary and proper to further Congress's Commerce Clause powers. Hence, this Court's holding in *Riverside Bayview Homes, Inc.*, 474 U.S., at 133-35, that Congressional power extends to wetlands that are *adjacent* to, and thereby directly affect, navigable waters (at least arguably). But even if *Riverside Bayview* remains good law after *SWANCC*, extending that holding to cover "waters" that are not adjacent to navigable waters, and even "wetlands" that are not waters at all, merely because of some ultra-tenuous connection many steps removed from the navigable waters themselves, would simply obliterate any limits on the Commerce power. Indeed, even a tenuous connection would apparently not be necessary. Wholly isolated waters, such as the gravel-pit puddles at issue in *SWANCC*, would be "connected" to navigable waters by virtue of the fact that water evaporates, forms clouds, and then at some point rains into navigable waters.

soever with navigable waters, demonstrating that water quality, not navigability, was Congress's chief concern. 33 C.F.R. § 328.3(a)(3); *see also* 33 U.S.C. § 1251(a). That is a police power purpose, and reliance on the Commerce Clause power is mere pretext for its exercise.

As the facts of these cases make amply clear, the protection of the health, safety, and welfare of the people—the traditional definition of the police power reserved to the States, *see, e.g., South Covington & C. St. R. Co. v. City of Covington*, 235 U.S. 537, 546 (1915)—requires a careful balancing of competing concerns, a balancing that is best left to the people and governments who will most directly bear the consequences of the decision. *See, e.g., Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago*, 107 U.S. 678 (1883) (noting that the police power "can generally be exercised more wisely by the states than by a distant authority"). Here, the preservation of isolated wetlands (and the localized ecologies that might arguably depend on them), is pitted against the need for housing and the property rights of Petitioners. The balancing of those competing interests was undertaken here by the appropriate state authorities, and there is not a hint of suggestion that in granting permits to Petitioners the local authorities acted to favor their own state's citizens at the expense of citizens in other states, much less at the expense of commerce in other states.

The process described above demonstrates the proper exercise of the state police powers in action. Given this Court's recent solicitude for the sovereignty of the States, *see, e.g., Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 527 U.S. 706 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999), it would be odd indeed if Congress could intrude upon the powers reserved to

the States, and hence on state sovereignty, in the much more substantial way presented by the Corps' interpretation of the Clean Water Act at issue here.

That does not mean that without comprehensive and expansive federal regulation, a State, through the exercise of its police powers, could immunize actions that have a detrimental effect in other states. Traditional tort and nuisance law remains available. *See, e.g., Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840 (4th Cir. 1999), *aff'd sub nom, United States* v. *Morrison*, 529 U.S. 598 (2000); *Missouri* v. *Illinois.*, 180 U.S. 208 (1901). Even for waters that touch upon two or more States, the States remain free to enter into agreements to regulate the waters to their mutual benefit. *See, e.g., Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1893) (describing an agreement to drain a malarial district on the border between two States as an example of an interstate agreement that could "in no respect concern the United States"). And on the chance that such an agreement might be made to the detriment of other states, the Congressional consent requirement of the Compacts Clause of Article I, Section 10 provides a sufficient check. U.S. CONST., ART. I, Sec. 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power"); *see also West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. . . . [I]t is also a means of safeguarding the national interest").

In short, there is as little need for federal regulation here as there is constitutional authority. That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of Michigan provides no constitutional title for them to do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are exclusively borne by the people of

Michigan. Our Constitution leaves such decisions to the States for good reason. The inference-upon-inference reasoning of the Corps and the Court of Appeals below should not be allowed to alter that fundamental constitutional structure.

## IV. The Department of Justice Should Have Confessed Error Once This Court Issued Its Ruling in *SWANCC*.

Although we are of the opinion that, under *Lopez*, the *Rapanos* litigation was illegitimate from the outset, there was at the time it was commenced at least a (barely) colorable ground for the government's position that *Lopez* and *Morrison* dealt with state criminal law, not environmental law, and that somehow the Commerce Clause permitted a broader scope of federal regulatory power in the latter context than in the former. That argument was rebuffed pretty soundly by this Court in *SWANCC*, but instead of dropping the criminal prosecution in *Rapanos I*, and the subsequent civil actions at issue here, the government adopted the astounding position that *SWANCC* was limited to the "migratory bird rule" and had nothing to say about other, equally tenuous connections to interstate commerce being proffered as sources of the broad regulatory power being asserted by the Corps of Engineers—essentially ignoring the entire last section of this Court's opinion in *SWANCC*.

Nor did the government's back-of-the-hand treatment of *SWANCC* end with the Corps of Engineers overly-zealous advocacy of its expansive claims of power. Once *SWANCC* was decided, these cases called out for the government to confess error, but the Department of Justice instead vigorously pressed the matter in the *Rapanos I* criminal action, both at the Court of Appeals and by successfully opposing the petition for certiorari filed with this Court, and it continued to press the matter in the subsequent civil actions at issue here.

We do not mean to suggest that government attorneys should not be zealous advocates of the government's well-grounded positions. But zealous advocacy of positions that are, at best, barely colorable is a different matter, or at least should be. It may be that the Department of Justice now views its role as simply that of advocate for its government agency clients rather than for the Constitution. *Compare Confirmation Hearing on the Nominations of Larry D. Thompson to be Deputy Attorney General and Theodore B. Olson to be Solicitor General of the United States*, Hearing Before the S. Comm. on the Judiciary, 107th Cong. 127 (2001) (statement of Theodore Olson) (Sup. Doc. No. Y4.J89/2:S.HRG.107-250) (noting Justice Department's "responsibility to do everything it can within reason to defend the constitutionality" even of statutes that President believes to be unconstitutional), and "*Presidential Authority to Decline to Execute Unconstitutional Statutes*," 18 OP. OFFICE OF LEGAL COUNS. 199 (1994) ("[I]f the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue"), *with Metro Broadcasting, Inc.* v. *Federal Communications Commission*, 497 U.S. 547, 551 (1990) (noting that, in an *amicus curiae* brief filed by then-Acting Solicitor General Roberts, the United States contended that a race-based allotment of broadcast licenses was unconstitutional despite the position of the Respondent FCC to the contrary). If so, then the Department should no longer benefit from the traditional deference that it has been afforded by this Court. *See, e.g., Virginia Dep't of Ed.* v. *Riley*, 106 F.3d 559, 566 (CA4 1997) (Luttig, J., dissenting in an opinion adopted by the majority at the rehearing en banc) (discussing the "traditional respect accorded to the Department [of Justice]" by courts).

## CONCLUSION

The decisions of the United States Court of Appeals for the Sixth Circuit should be reversed. The Corps of Engineers' expansive interpretation of the Clean Water Act should be invalidated.

Respectfully submitted,

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
*Counsel of Record*
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

*Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence*

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